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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Seventh Circuit erred when, contrary to the District Court in this case and the United States Court of Appeals for the Third Circuit in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), it held that the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), specifically 29 U.S.C. § 1399(c)(1), does not allow a multiemployer plan to include in the amount of a withdrawing employer's liability for unfunded, vested benefits, interest for the year from the date which MPPAA requires the plan to use in calculating the amount of the employer's liability to the date MPPAA instructs the plan to assume, for the purposes of amortizing the payments, that the employer will make its first payment to the plan.

II. Whether the United States Court of Appeals for the Seventh Circuit erred when it held that, an employer which reserved to itself the right to select the method utilized to calculate the liability imposed on an employer withdrawing from a multiemployer, under-funded, defined benefit pension plan, does not have fiduciary responsibilities to the plan, its participants or beneficiaries but rather, as occurred in this case, may unilaterally impose upon the plan the method which is in its own best interest.[1]

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[1] In accordance with Rule 14.1(b) of the United States Supreme Court, all parties to the proceeding in the United States Court of Appeals for the Seventh Circuit appear in the caption of this case. Subsequent to the time it withdrew from the Milwaukee Brewery Workers' Pension Plan, The Stroh Brewery Company acquired Jos. Schlitz Brewing Company and assumed its liability to the Pension Plan. In addition to the Respondents, the Miller Brewing Company and Pabst Brewing Company were participating employers in the Plan. All participants in the Plan are members of United Auto Workers Local No. 9, A.F.L.-C.I.O.

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JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Milwaukee Brewery Workers' Pension Plan (Plan), respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), specifically 29 U.S.C. § 1399(c)(1) (1980), does not allow a multiemployer plan to include in the amount of a withdrawing employer's liability for unfunded, vested benefits, interest for the year from the date which MPPAA requires the plan to use in calculating the amount of the employer's liability to the date MPPAA instructs the plan to assume, for the purposes of amortizing the payments, that the employer will make its first payment to the plan. The Seventh Circuit also held that, when an employer reserves to itself the right to select the method utilized to calculate the liability imposed on an employer withdrawing from a multiemployer, under-funded, defined benefit pension plan, the employer has no fiduciary responsibilities to the plan participants and beneficiaries but rather, may unilaterally impose upon the plan the method which the employer deems is in its own best interest.

OPINIONS BELOW

Arbitrator's Decision: Pursuant to 29 U.S.C. § 1401, the parties submitted their dispute relating to the amount of Schlitz' withdrawal liability to arbitration. The Arbitrator issued an Opinion and Award and Final Award. The Arbitrator re-calculated Schlitz' withdrawal liability based upon the presumptive method for calculating liability rather than the direct attribution method used by the Plan. The Arbitrator also excluded interest for the period from the date used to calculate Schlitz' liability to the date MPPAA required the Plan to presume Schlitz would make its first payment. The Arbitrator's decision resulted in a reduction in Schlitz' withdrawal liability from $41,031,406 imposed by the Plan to $23,300,000. A copy of the Arbitra-

tor's Award and Opinion and the Final Award is included in the Appendix as Exhibits E and F.

District Court Opinion: The District Court rendered a series of opinions. On June 6, 1991, the Court issued a Decision and Order affirming the portion of the arbitrator's award which required re-calculation of Schlitz' withdrawal liability under the presumptive method. However, the District Court reversed and vacated that portion of the arbitrator's award which eliminated interest on the amount of Schlitz' withdrawal liability for the period between the calculation date and the presumptive first payment date. The District Court entered Judgment based upon the June 6, 1991 Decision and Opinion. The District Court's opinion is not reported but is included in the Appendix as Exhibit B.

Through Orders on June 3, 1992 and October 20, 1992, the District Court disposed of issues raised in a timely Rule 59(e) Motion filed by the Plan. The District Court ordered Schlitz to pay the Plan an additional $3,221,371 plus post-judgment interest. These orders are not reported but are included as Exhibits C and D in the Appendix.

Court of Appeals: The Seventh Circuit reversed and remanded the case to the District Court with instructions to enter judgment affirming the Arbitrator's award in its entirety. This Opinion is reported at *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993); 16 E.B.C. 2841 and is contained in the Appendix as Exhibit A.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this Petition for *Certiorari* pursuant to 28 U.S.C. § 1254(1). The Seventh Circuit issued its opinion on August 13, 1993. Pursuant to Supreme Court Rules 13, 14 and 29, the Plan has filed a timely Petition for *Certiorari*.

The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered a judgment on June 6, 1991. The District Court finally disposed of a timely Rule 59(e) Motion to Alter or Amend Judgment on October 29, 1992. Although the District Court did not enter a new judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure, the Seventh Circuit correctly concluded that the parties had waived that requirement. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). A timely Notice of Appeal was filed on November 17, 1992. The Seventh Circuit held that it had jurisdiction to consider the appeal.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, 9 U.S.C. §§ 9 and 29 U.S.C. § 1401(b)(3). The Complaint filed in the District Court sought confirmation of the Arbitrator's award. The Counterclaim filed asked that the award be vacated.

STATUTES INVOLVED

The following applicable statutes have been reproduced and are found in the Appendix Exhibit G.

29 U.S.C. § 1002(21)(A)
29 U.S.C. § 1391
29 U.S.C. § 1104
29 U.S.C. § 1400
29 U.S.C. § 1401

STATEMENT OF THE CASE

The Milwaukee Brewery Workers' Pension Plan is a multiemployer, defined benefit pension plan (Stipulated Statement of Facts[2] at ¶ 6). The Plan was established

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[2] The parties submitted a Stipulated Statement of Facts to the Arbitrator. Most of the facts contained in this Statement of the

(continued...)

March 1, 1954 by an agreement dated August 16, 1954 between Brewery Workers' Local Union No. 9 D.A.L.U. (now U.A.W.), A.F.L.-C.I.O. (Local 9) and participating employers (Stipulation ¶ 5, 6). In 1958, there were six employer participants which bargained jointly as members of the Milwaukee Brewers' Association (Association): Schlitz, Blatz Brewing Company, A. Gettelman Brewing Co., Independent Milwaukee Brewery, Miller Brewing Company (Miller) and Pabst Brewing Company (Pabst) (Stipulation ¶¶ 2, 3, 4, 7, 9). From approximately 1959 through January 1, 1981, the Plan had only three major employer contributors, Miller, Pabst and Schlitz (Stipulation ¶ 14; Transcript of Arbitration Proceedings (Transcript); Volume II, 8/12/87 at 313). The Plan was operated and administered by a Joint Committee consisting of members appointed by Local 9 and the participating employers (Stipulation ¶ 19). The Joint Committee did not have the power to amend the Plan (Stipulation ¶ 21). The Plan could be amended by "mutual agreement of the Union and the Employers" (Stipulation ¶ 16).

On January 16, 1981, at a specially called meeting of the Joint Committee, counsel for the Plan discussed the then recently enacted MPPAA (Stipulation ¶ 24). The Joint Committee instructed legal counsel to the Plan to prepare a letter to Local 9, Miller, Pabst and Schlitz notifying them of the effect of the new law, including the new provisions relating to liability imposed on a withdrawing employer (Stipulation ¶ 22). In MPPAA, Congress provided a method for calculating withdrawal liability which would be automatically utilized if no other permissible method had been selected by the Plan, *see* 29 U.S.C. § 1391. Accordingly, the

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[2] (...continued)
Case are taken from the Stipulation as set forth in the Arbitrator's Opinion (Appendix, Exhibit E). The remainder of the facts are from the testimony before the Arbitrator. The District Court made no new or additional findings of fact.

letter from counsel advised Local 9 and the employers that unless the Plan was amended, the presumptive method for calculating withdrawal liability would apply to the Plan (Stipulation ¶ 23).

In May 1979, Miller, Pabst and Schlitz were, for the first time, unable to reach an agreement on a joint proposal to be submitted to Local 9 (Stipulation ¶¶ 24-28). On January 21, 1981, Schlitz notified Miller, Pabst and Local 9 that Schlitz was withdrawing from the Association and that it would negotiate separately with Local 9 (Stipulation ¶ 29). While negotiations continued, Schlitz remained a contributing employer in the Plan. On March 9, 1981, Schlitz gave notice to Local 9 of its desire to amend the collective bargaining agreement and to reopen the Pension Agreement (Stipulation ¶ 33). On May 20, 1981, Miller, Pabst and Schlitz received notice of a meeting scheduled for May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan" (Stipulation ¶ 35). Schlitz did not attend the meeting.

Local 9 reached an agreement with Miller and Pabst on a new collective bargaining agreement (Stipulation ¶ 48). The old collective bargaining agreement expired on May 31, 1981. After Schlitz and Local 9 negotiated to impasse, on June 1, 1981, Local 9 members went out on strike at the Schlitz plant (Stipulation ¶ 36, 38). On July 31, 1981, Schlitz announced that it was permanently closing its Milwaukee plant (Stipulation ¶ 38). Charles Mazza, the Schlitz representative on the Joint Committee, continued to attend meetings of the Committee until his resignation on August 14, 1981. Schlitz withdrew from the Plan on the same date (Stipulation ¶ 31).

Local 9, Miller and Pabst did meet as scheduled on May 22, 1981 and again on May 29, 1981 and agreed to two Memoranda of Understanding (Stipulation ¶¶ 44, 46). These Memoranda amended the Plan effective May 22, 1981 to provide that in connection with any employer

withdrawal from the Plan that occurs on or after May 22, 1981, the Plan will calculate withdrawal liability based upon the direct attribution method permitted by Section 4211(c)(4) of MPPAA. 29 U.S.C. § 1391(c)(4). Schlitz did not agree to the May 22, 1981 or May 29, 1981 Memoranda of Understanding (Stipulation ¶ 47). On August 17, 1981, after Schlitz withdrew from the Plan, the Joint Committee instructed the Plan's actuary to calculate Schlitz' withdrawal liability based on the direct attribution method called for by the two Memoranda of Understanding (Stipulation ¶ 51).

MPPAA provides that the amount of unfunded vested benefits used to calculate an employer's liability will be the amount of unfunded vested benefits at the end of the year preceding the employer's withdrawal. 29 U.S.C. § 1391. MPPAA also provides that an employer shall pay its withdrawal liability over the period of years necessary to amortize such amount in level annual payments calculated as if the first payment were made on the first day of the plan year following the plan year in which withdrawal occurs. 29 U.S.C. § 1399(c)(1)(A)(i). Schlitz gave its notice of withdrawal in August, 1981. Pursuant to the provisions of MPPAA, the Plan included within the amount of Schlitz' liability interest for the period from the date Schlitz' liability was calculated, December 31, 1980, to the date on which Schlitz' first payment was presumptively to be made, January 1, 1982.

On September 29, 1981, the Joint Committee sent a letter to Schlitz imposing withdrawal liability in the amount of $41,031,406 (Stipulation ¶ 53). On October 2, 1981, Schlitz wrote to the Plan requesting information on the calculation of its withdrawal liability (Stipulation ¶ 54). The Plan provided information and Schlitz continued to request additional information from the Plan until March 19, 1982 when Schlitz sent a letter to the Plan requesting arbitration (Stipulation ¶¶ 55, 56, 58, 59, 60, 61). On the same day, Schlitz filed suit in the United States District Court for the Eastern District of Wisconsin against several

parties including the Plan and the Pension Benefit Guaranty Corporation (PBGC). On December 28, 1984, the District Court dismissed the Complaint because MPPAA provides that disputes over the calculation of withdrawal liability must first be submitted to arbitration. The parties then proceeded to arbitration.

During the arbitration hearings, Schlitz admitted that the financial condition of the Plan was a matter of significant concern and, in fact, acknowledged that the unfunded vested liability of the Plan in 1981 was a horrendous problem (Transcript Volume I, 8/11/87 at 73). By Schlitz' own acknowledgement, a disagreement over whether to increase benefits was one of the reasons that Schlitz withdrew from the Association. *Id.* In addition there was concern, well known to Schlitz, that the Plan could not meet its minimum funding requirements in 1981 or at least at some time during the term of the new collective bargaining agreement (Transcript Volume II, 8/12/87 at 210; Volume IV, 9/29/87 at 630). In 1981, beer sales were declining, employment in the brewing industry was declining and the hours worked by employees in the breweries were declining (Transcript Volume I, 8/11/87 at 96). Union membership had declined from a high of 8,800 workers to 3,000 workers in 1981 (Transcript Volume II, 8/12/87 at 313). As more and more brewery workers retired and as the brewery industry in Milwaukee shrank, contributions to the Plan were not keeping pace.

Schlitz admitted it considered the best interests of Schlitz, not the Plan or its participants and beneficiaries when it refused to agree to application of the direct attribution method rather than the presumptive method to calculate a withdrawing employer's liability to the Plan. (Transcript Volume I, 8/11/87 at 104). Schlitz attempted to justify its conduct by asserting that Miller and Pabst amended the Plan to provide for the method which was in their own best interest. According to Schlitz, none of the employers was concerned with the best interest of the Plan.

Miller's representative testified that he believed the direct attribution method was appropriate because each employer was allocated the liability associated with its own retirees (Transcript Volume II, 8/12/87 at 271), and because fiduciary concerns about the stability of the Plan had to govern the selection of a method for calculating withdrawal liability (Transcript Volume II, 8/12/87 at 266-268). The Pabst representative testified that it similarly considered its obligations to the beneficiaries of the Plan and approved the Plan amendment selecting the direct attribution method (Transcript Volume III, 8/14/87 at 551-53).

The Plan's registered actuary testified that because the Plan had maintained good records, because there were only three participating employers for a substantial period of time and because there was not much movement of workers between employers, the direct attribution method was particularly appropriate for this Plan (Transcript Volume V, 9/29/87 at 658-59). In 1980, the Plan had approximately $51 million in assets (Transcript Volume V, 9/29/87 at 662). At the time Schlitz withdrew, the Plan's actuary calculated the total vested liability for the Plan as $162 million, leaving an unfunded vested liability of $111 million (Transcript Volume V, 9/27/92 at 728).

The Plan presented Jeffrey N. Clayton, former administrator of the Office of Pension and Welfare Benefits Programs as an expert witness (Transcript Volume VII, 10/1/87 at 870, 872). Mr. Clayton testified that the selection of the method for determining withdrawal liability under MPPAA clearly involves fiduciary responsibilities (Transcript Volume VII, 10/1/87 at 886). Mr. Clayton also testified that the direct attribution method was the only appropriate method for calculating withdrawal liability for this Plan (Transcript Volume VII, 10/1/87 at 887-892, 894). Schlitz presented no evidence that the presumptive method was in the best interest of the Plan, its participants and beneficiaries.

Arbitrator's Award[3]

Relying upon the unanimous consent requirement found in the Association Agreement as well as the dictionary definition of "agreement," the Arbitrator held that Schlitz' consent was necessary to amend the Plan (Appendix Exhibit E at 18-19). Because Schlitz had not agreed to the Plan amendment, the arbitrator concluded that the Plan's calculation of Schlitz' withdrawal liability on the basis of the direct attribution method was clearly erroneous (Appendix Exhibit E at 28). The Arbitrator rejected the Plan's argument that Schlitz' agreement to the amendment was unnecessary because selection of the method for calculating withdrawal liability is a fiduciary function (Appendix Exhibit E at 23-28). The Arbitrator also held that it was clearly erroneous for the Plan to include as part of Schlitz' liability, interest on Schlitz' liability for the year 1981 because MPPAA did not specifically provide for interest relating to that period (Appendix Exhibit E at 38-41). Ultimately, on August 24, 1988, the Arbitrator ruled that Schlitz' withdrawal liability should have been $23,300,000.

District Court's Decision And Orders

On August 29, 1988, Schlitz filed a Complaint in the United States District Court for the Eastern District of Wisconsin seeking confirmation and enforcement of the Arbitrator's award. The Plan filed an Answer and Counterclaim asking the Court to vacate or modify the award. The parties submitted briefs in support of their positions. On June 6, 1991, the District Court decided that the Arbitrator's opinion that unanimous consent was necessary to amend the Plan was not clearly erroneous and therefore,

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[3] Numerous issues were submitted to the Arbitrator. Some of those issues were not pursued in the District Court. Only those portions of the Arbitrator's decision relevant to the issues raised in this Petition for *Certiorari* are discussed.

the Plan's calculation of Schlitz' withdrawal liability based upon the direct attribution method was clearly erroneous (Appendix at Exhibit B). The District Court also rejected the Plan's argument that selecting the method for calculating withdrawal liability is a fiduciary function. The District Court did, however, conclude that the Plan had properly included interest on the amount of Schlitz' withdrawal liability for 1981 and vacated the Arbitrator's award on that issue (Appendix Exhibit B). The District Court entered Judgment on June 6, 1991.

The Plan filed a timely Rule 59(e) Motion to Alter or Amend the Judgment. The Plan asked the Court to quantify the amount in excess of $23,300,000 Schlitz owed to the Plan based upon the 1981 interest which was properly included in Schlitz' liability and to award the Plan prejudgment interest on that amount. In Orders entered on June 3, 1992 and October 20, 1992, the District Court found the amount of Schlitz' additional withdrawal liability to be $2,619,041; awarded the Plan pre-judgment interest at the prime interest rate on the amount through June 6, 1991; and awarded post-judgment interest at the statutory interest rate on that amount after June 6, 1991 (Appendix Exhibits C and D). The Plan filed a timely Notice of Appeal and Schlitz filed a timely Notice of Cross-Appeal.

Seventh Circuit's Opinion

The Seventh Circuit reversed the District Court's decision and remanded the case with instructions to enter judgment affirming the Arbitrator's award in full. The Seventh Circuit held that the party or parties responsible for selecting the method of calculating withdrawal liability had no fiduciary responsibility to select the method in the best interests of the Plan, its participants and beneficiaries. The Seventh Circuit also rejected the holding of the United States Court of Appeals for the Third Circuit in *Huber v. Casablanca Fans*, 916 F.2d 85 (3d Cir. 1990). Instead, the

Court adopted the analysis of the Fourth Circuit in *Borden, Inc. v. Bakery Confectionery Union & Industry Pension*, 974 F.2d 528 (4th Cir. 1992), by holding that MPPAA does not allow the Plan to include interest on the amount of Schlitz' withdrawal liability for the period from the date liability is fixed to the date of presumptive first payment.

REASONS FOR ALLOWING THE WRIT

The Court should grant this writ to the United States Court of Appeals for the Seventh Circuit in this case for two reasons. First, to resolve an intolerable conflict among the Circuits on the application of a provision of MPPAA which impacts directly on multiemployer pension plans every time an employer withdraws from a multiemployer plan. In this case, the Seventh Circuit joined the Fourth Circuit in conflict with the Third Circuit on the interpretation of a critical provision in MPPAA. The Seventh Circuit's interpretation of MPPAA resulted in a reduction of several million dollars in the amount Schlitz was required to pay to the Plan. The conflict creates an intolerable situation for multiemployer pension plans and participating employers because it makes it impossible to calculate the amount of withdrawal liability without a determination of which interpretation of MPPAA will apply to a particular withdrawal.

The Court should also allow this writ because this case presents a significant question of federal law which directly impacts virtually every multiemployer defined benefit pension plan in the country, the collective bargaining process typically surrounding such plans, every contributing employer and every participant in multiemployer defined benefit pension plans.[4] The Court should allow this

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[4] In its 1992 Annual Report, released on February 23, 1993 the Pension Benefit Guaranty Corporation (PBGC) reported that

(continued...)

writ to confirm that Congress intended to make decisions which directly impact vested pension benefits, such as the selection of the method for calculating withdrawal liability, subject to fiduciary duties and not the subject of negotiation.

I.

THIS COURT SHOULD ALLOW THE WRIT OF *CERTIORARI* TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE INTERPRETATION OF A SIGNIFICANT PROVISION OF MPPAA WHICH MUST BE APPLIED EACH TIME AN EMPLOYER WITHDRAWS FROM A MULTIEMPLOYER PENSION PLAN.

Each time an employer withdraws from a multiemployer defined benefit pension plan, the plan is required to calculate that employer's liability for the unfunded, vested benefits. In many multiemployer plans, contributing employers and participants are located in many different federal judicial circuits. MPPAA provides the plan with some guidelines for calculating a withdrawing employer's liability. One of Congress' goals in enacting MPPAA was to provide plans and contributing employers with some degree of certainty about the amount of withdrawal liability.

MPPAA provides that the amount of an employer's withdrawal liability is calculated as of the end of the year **prior** to the year in which the withdrawal occurs. 29 U.S.C. § 1391(c)(2)(C)(i). In virtually every instance, because of the amount of the liability, a withdrawing employer will choose to make payments to the plan over time. MPPAA provides that payments are **amortized** based upon the assumption that the first payment was made on the first day of the

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[4] (...continued)
there are 8.9 million participants in about 2,000 multiemployer plans. The PBGC estimates underfunding of those plans at approximately $11 billion. The PBGC is estimating its liability for multiemployer plans which may require financial assistance at $145 million.

plan year **following** withdrawal. 29 U.S.C. § 1399(c)(1)(A)(i). Thus, there is a "gap" of one year between the date used to calculate a withdrawing employer's liability and the date on which the first payment is presumptively made.

The Third Circuit has interpreted MPPAA to permit plans to include in the amount of withdrawal liability interest for this "gap" year. In this case, the Seventh Circuit joined with the Fourth Circuit in prohibiting plans from including "gap year" interest. In this case, as in many others, the difference in the amount of withdrawal liability can amount to several million dollars[5] depending upon whether the Third Circuit's or the Fourth and Seventh Circuits' interpretation is applied. This Court should resolve this intolerable conflict so that the mere fortuity of the geographic location of a particular employer or plan does not significantly alter the amount of withdrawal liability imposed on a withdrawing employer. The Court should also resolve the conflict because multiemployer plans, as well as participating employers, need to be able to calculate their withdrawal liability without first resorting to difficult choice of law analysis. As long as the conflict remains, litigation over which Circuit's law should apply will needlessly devour judicial resources.[6]

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[5] In this case, Schlitz withdrew from the Plan in August 1981. Therefore, under MPPAA, the Plan calculated Schlitz' liability as of December 31, 1980 and it calculated the amortized payments as if the first payment was not made until January 1, 1982. The Plan included interest on the amount of that liability for the year of 1981. Interest for the "gap year," December 31, 1980 through January 1, 1982, amounted to $1,631,000. Because Schlitz was allowed to pay this interest over time, including the "gap year" interest added an additional $2,619,041 to Schlitz' total withdrawal liability.

[6] The fact that in three years, three federal courts of appeals have addressed this issue demonstrates that it is an important recurring issue.

In 1990, the Third Circuit held that because MPPAA requires an **amortization** of payments **as if** the first payment was made on the first day of the plan year **following** withdrawal, *see* 29 U.S.C. § 1399(c)(1)(A)(i), interest for the period from the date used to calculate the liability to the date the first payment is presumed to have been made should be included in the amount of a withdrawing employer's liability. *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 97 (3d Cir. 1990). In 1992, the Fourth Circuit rejected the analysis in *Huber* and in *Borden, Inc. v. Bakery Confectionery Union & Industry Pension*, 974 F.2d 528 (4th Cir. 1992), held that because MPPAA did not explicitly provide for interest during this period, the plan had no authority to include interest for that period in the amount of an employer's withdrawal liability. In this case, the Seventh Circuit joined with the Fourth Circuit in holding that MPPAA does not authorize assessment of interest before the employer's obligation to pay arises, *Schlitz*, Slip op. at p. 17.[7] Thus, the holding in this case adds to the confusion in an already complex area. Until this confusion is resolved, litigation over this issue will continue. This Court should allow the writ to resolve this conflict and to eliminate the costly litigation this conflict will foster. It is not difficult to imagine the race to the Courthouse in an effort to take advantage of favorable law in a particular Circuit.

In *Huber*, the Third Circuit engaged in a careful and thorough analysis of this issue. In reaching its conclusion, the Court noted that the MPPAA scheme of payments is similar to an immediate annuity concept rather than an

[7] The Seventh Circuit suggested, without answering the question, that this provision of MPPAA might allow the plan to charge interest from the date of actual withdrawal to the date the first payment is presumed to have been made. Slip op. at 18. Thus, the opinion in this case leaves open the possibility of a third different interpretation of the same provision of MPPAA.

annuity-due concept. The Court explained the distinction as follows:

> All other factors being equal, the amortization period for an annuity-due will be shorter than that of an immediate annuity because the first payment of an annuity-due is made at the beginning of the interval, and is therefore applied entirely to principal—no interest has yet accrued. On the other hand, a significant portion of the first payment of an immediate annuity is applied to interest—the interest on the principal for the first interval,

916 F.2d at 98.[8] Because MPPAA provides for a calculation date in one year and a first payment date at the beginning of another, Congress clearly intended for the payment plan to follow the immediate annuity concept. 916 F.2d at 98. The immediate annuity concept provides for interest from the date liability is fixed until the date of the first payment by increasing the total liability to reflect interest for that period. In this regard, the amortization schedule for withdrawal liability is similar to a mortgage. While the first payment on a mortgage may not be due until one month after the loan proceeds are disbursed, interest for that month is not waived, it is incorporated into the total debt and amortized over the life of the loan.

In *Huber*, the Court went on to note that the PBGC had submitted an amicus brief conceding that it could not ascertain the intent of Congress on this issue but arguing that because MPPAA does not specifically provide for the interest in that period, it should not be allowed. 916 F.2d at

[8] Although far from persuasive and not relied upon by the Court in *Huber*, the only potentially applicable legislative history supports the conclusion that Congress intended to allow the plans to include "gap year" interest in the amount of a withdrawing employer's liability. *Huber*, 916 F.2d at 98 n. 30.

96-7.[9] However, the Court rejected the PBGC's argument, concluding that it was not supported by the overall scheme set up by Congress for calculating the amount of a withdrawing employer's liability.

The Court in *Huber* also rejected the employer's plea that it was being penalized or charged double interest. The Court noted that an employer could avoid this possibility by withdrawing near the end of the plan year. Moreover, the Court recognized that in setting forth the method for calculating withdrawal liability, Congress was interested in rough equity, not precision. 916 F.2d at 85. Thus, in *Huber*, the Court carefully and convincingly refutes the arguments made by Schlitz and accepted by the Seventh Circuit in this case.[10]

On the other hand, the Courts' analysis in this case and in *Borden* ignores a fundamental rule of statutory construction which requires, whenever possible, that no portion of the statute be rendered inoperative. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Anna*, 472 U.S. 237, 249 (1985). In MPPAA Congress did not explicitly provide for interest in this "gap" period. However, in § 1399(c)(1)(A)(i), Congress provided that the amount of a withdrawing employer's liability would be paid over the period of years necessary to **amortize** the amount calculated **as if** the first payment **were made** on the first day of the plan year following the plan year in which the withdrawal occurs and **as if** each subsequent payment were made on the first day of each subsequent year. In the very same section, Congress recognized that the date of the actual first payment will not necessarily be consistent with the date used for the purpose of amortizing the payments.

If the Court in *Borden* is correct, then the distinction in § 1399(c)(1)(A)(i) of MPPAA between the date the first payment is presumed to have been made and the date the first payment is actually to be made is superfluous. If Congress intended to exclude interest for this period, it could have specifically done so, or it could have simply provided that the payments be amortized as if the first payment was made on the date MPPAA requires the payment to actually be made. This Court should allow the Petition for *Certiorari* to resolve the conflict among the Circuits and ultimately reject the superficial analysis in this case and in *Borden* in favor of the more well-reasoned opinion in *Huber*.[11]

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[9] The Plan has been unable to locate any other case in which the PBGC has addressed this issue. It is, therefore, not clear whether the PBGC continues to maintain this position. The Seventh Circuit correctly refused to give any weight to the PBGC's litigating position in another case. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988); Slip op. at 16.

[10] The Court in *Huber* refused to allow interest from the assumed date of the first payment as provided in 29 U.S.C. § 1399(c)(1)(A)(i) to the date an actual payment is made in accordance with § 1399(c)(2). The Plan has not requested interest for any similar period in this case.

[11] The reported arbitration decisions on this issue are also split. *See Loomis Armored, Inc. v. Central States Pension Fund*, 8 EBC 1899 (1987) (interest for year of withdrawal properly included); *Carnation Co., Inc. v. Central States Pension Fund*, 9 EBC 1409, 1449 (1988) (assessment of interest for withdrawal year is not proper).

II.

THIS COURT SHOULD ALLOW THE WRIT TO ADDRESS A SIGNIFICANT QUESTION OF FEDERAL LAW WHICH DIRECTLY IMPACTS: EVERY MULTIEMPLOYER DEFINED BENEFIT PENSION PLAN IN THE COUNTRY; EVERY EMPLOYER PARTICIPATING IN THOSE PLANS; EVERY EMPLOYEE AND THEIR BENEFICIARIES COVERED BY THOSE PLANS; AND THE COLLECTIVE BARGAINING PROCESS SURROUNDING THOSE PLANS—WHETHER CONGRESS INTENDED THAT THE PARTY SELECTING THE METHOD FOR CALCULATING WITHDRAWAL LIABILITY HAS A FIDUCIARY RESPONSIBILITY TO THE PLAN'S PARTICIPANTS AND BENEFICIARIES.

In MPPAA, Congress imposed, for the first time, liability on an employer withdrawing from an under-funded defined benefit multiemployer pension plan. "Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement-and if he has fulfilled whatever conditions are required to obtain a vested benefit-he actually will receive it.' " *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721 (1984) (quoting *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 375 (1980)). Congress provided a method for calculating withdrawal liability, 29 U.S.C. § 1391(b), which is presumptively applied unless a particular plan has been amended to provide for one of the other permissible methods for calculating withdrawal liability or a method specifically approved by the PBGC. In this case, Schlitz as well as the Union and the other employers were aware that the presumptive method would automatically apply unless the Plan was amended.

One of the acceptable alternative methods is described as the direct attribution method because it attempts to attribute the portion of the unfunded liability directly to the employer who received the benefit of the work from the employees who earned the defined vested benefits. 29 U.S.C. § 1391(c)(4)(A). Although MPPAA provides that a

plan can be amended to choose an alternative to the presumptive method, it does not designate who may make such an amendment. In this case, the Plan could be amended by mutual agreement of the Union and the Employers. Thus, Schlitz and the other employers retained for themselves the right to select the method to be used to calculate the liability of a withdrawing employer.

Schlitz conceded that it was in favor of the presumptive method for calculating withdrawal liability because that method was in Schlitz' best interest (Transcript Volume I, 8/11/87 at 104). The Union, Miller and Pabst all agreed that the direct attribution method was in the best interest of the Plan, its participants and beneficiaries (Transcript Volume II, 8/12/87 at 271; Transcript Volume III, 8/14/87 at 545). The Plan has argued that because the responsibility for selecting the method used to calculate a withdrawing employer's liability is a fiduciary function, when Schlitz retained that responsibility, it also accepted a fiduciary duty to select the method for calculating withdrawal liability which was in the Plan's best interest. Therefore, Schlitz cannot hide behind its lack of consent to a change from the presumptive method to the method in the Plan's best interest. Obviously, whether the party which has responsibility for selecting the method for calculating withdrawal liability is performing a fiduciary function has far ranging implications for multiemployer plans, participating employers, and employee participants and their beneficiaries. The Seventh Circuit held that Congress did not intend that the party selecting the method for calculating withdrawal liability be subject to fiduciary duties to the plan participants. Slip op. at 11-14.

This Court should allow the writ to address the important federal question presented by this issue and ultimately to correct the erroneous decision of the Seventh Circuit which has ramifications far beyond the parties in this case. The language and structure of The Employee Retirement Income Security Act of 1974 (ERISA) and

MPPAA demonstrate that Congress intended the selection of the method for calculating withdrawal liability to be a fiduciary function. The legislative history confirms that Congress intended for the method of calculating withdrawal liability to be subject to fiduciary duties. Every other Court, including this Court recently in *Concrete Pipe And Products of California, Inc. v. Construction Laborers Pension Trust For Southern California*, ___ U.S. ___, 113 S.Ct. 2264, 2276-78 (1993), which has considered MPPAA's withdrawal liability provisions, has observed or assumed the obvious, that persons with fiduciary obligations to the Plan will make the decision about the method used to calculate withdrawal liability.

The potential ramifications of the Seventh Circuit's erroneous decision reach far beyond the impact on Schlitz and the participants in this multiemployer plan. The Seventh Circuit's opinion encourages all multiemployer plans to reserve to the participating employers the right to select the method for calculating withdrawal liability and, thereby, eliminate any responsibility to the plan participants for the consequences of that decision. The Seventh Circuit purports to leave the decision of selecting a method for calculating withdrawal liability to the free market forces of the collective bargaining process. Slip op. at 13. Unfortunately, those who are most directly impacted by the decision are not represented in the process.[12] Moreover, Congress through MPPAA, has provided a tremendous advantage to those parties in that process which favor the presumptive method. The lack of agreement on another method results in the automatic application of the presumptive method, regardless of its impact on the particular plan

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[12] While the union represents the plan participants in the collective bargaining process, the Union must be concerned with more than just providing for funding of unfunded, vested pension benefits. Accordingly, the Union acting in its own best interest may not chose a method for calculating withdrawal liability in the plan's best interest.

or participating employer. If the method for calculating withdrawal liability is, as the Seventh Circuit holds, a subject for collective bargaining, the NLRB will soon be charged with attempting to determine whether the parties are negotiating in good faith on that issue. Because of the far reaching implications for this decision, this Court should give careful consideration to the ease with which the Seventh Circuit ignored the language and structure of MPPAA, existing precedent and legislative history.

Although the Seventh Circuit's task is to determine Congressional intent, noticeably absent from the Seventh Circuit's opinion is any discussion of the structure of the language used in ERISA and MPPAA which give significant clues to Congress' intent, the legislative history which makes absolutely clear Congress' intent and the observations of the various Courts, including this Court, which have considered the withdrawal liability provisions in MPPAA. The Seventh Circuit should have started its analysis with the plain language of ERISA and MPPAA. ERISA provides a general description of fiduciary functions which includes exercising discretionary authority or discretionary control over management of a pension plan. 29 U.S.C. § 1002(21)(A)(i). Selecting the method a plan will use to determine what portion of its unfunded vested liability must be satisfied by a withdrawing employer is management of the plan. The Seventh Circuit rejected this argument and characterized the decision relating to withdrawal liability as establishing the terms of the Plan. Slip op. at 12. This analysis simply fails to grasp the impact the selection of a method for calculating withdrawal liability can have on the plan.

Allocating unfunded liability to a particular employer has far more impact on the plan than simply deciding which employer will ultimately bear the largest burden for the unfunded benefits. Obviously, allocation may bear upon the collectability of the funds. Delay and additional administrative costs associated with pursuing a financially

weakened or bankrupt employer or perhaps a claim with the PBGC may reduce the fund's ability to make the vested, earned benefit payments. Allocation has a direct impact on the financial health and stability of the remaining employers who, in multiemployer plans, are often competitors. A plan must be concerned with the financial stability of contributing employers.

Allocation impacts future wages and benefits to plan participants as the remaining employers struggle to cover inherited unfunded liability or are relieved from that burden. The method selected may trigger an employer to withdraw from a plan in order to take advantage of a method which it believes is favorable. Implementing one method may result in significant administrative costs to a plan which are not associated with other methods. Determination of which method for calculating withdrawal liability is in the best interest of the plan's participants and beneficiaries requires a balancing of these and other factors. As explained below, because it is necessary to balance competing factors, Congress made it clear that in calculating withdrawal liability, the fiduciary has broad discretion to select a method which is in the plan's best interest.

It is essential to keep in mind that at issue here is the funding of benefits which have been earned, by employees in many cases over a lifetime of work for the same company or in the same industry and that the employees and their beneficiaries rely on those benefits for retirement. If the funding of vested pension benefits is left to negotiations between the union and the various employers, the interests of the plan participants will not be represented in that process. Each employer will consider how a particular method impacts its own bottom line. In collective bargaining negotiations, the Union must be concerned with more than just the funding of an under-funded defined benefits plan. If the crucial and often difficult decision relating to withdrawal liability is left to negotiations, those who will be most directly affected by a negative impact on the plan will

be excluded from the very process by which a calculation method is selected. Selection of the method for calculating withdrawal liability is fundamentally a matter of plan management. The selection is a fiduciary function and should be made solely in the best interest of the plan's participants and their beneficiaries.

The Plan does not contend that all plan amendments impose fiduciary duties on the party making the amendment, but rather only that those amendments which impact vested benefits in a defined benefit plan are fiduciary functions. It is clear that employers can play multiple roles when dealing with issues relating to welfare and pension plans. *Ladish Co., Inc. v. International Ass'n of Machinist & Aerospace Workers, Dist. No. 10*, 966 F.2d 250, 253 (7th Cir. 1992); *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1266-68 (7th Cir. 1985). Some aspects of a pension plan such as the terms and conditions of future benefits which are not vested are subject to negotiation. *United Independent Flight Officers*, 756 F.2d at 1268. An employer such as Schlitz does not have any fiduciary duty to the beneficiaries of a plan when acting on an issue which is subject to negotiations. *Id.* On issues subject to negotiation, an employer is free to act in its own best interest. *Id.* For example, in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 816-818 (7th Cir. 1992), *reh'g. en banc. denied*, 962 F.2d 655, *petition for cert. filed* (Aug. 3, 1992), the Seventh Circuit held that an employer had no fiduciary obligation to continue providing health benefits after the contract providing for those benefits expired. Similarly, in *Young*, 849 F.2d at 1045, the Court held that an employer does not owe a fiduciary duty when it amends or abolishes a severance benefit plan. These types of amendments are the subject of negotiation. In this case, however, the Seventh Circuit has crossed the line it had previously established.

In both *Young*, 849 F.2d at 1045 and *United Independent Flight Officers*, 756 F.2d at 1280, the Seventh Circuit carefully limited its holdings to amendments which impacted terms and conditions of future pension benefits, where those benefits are not protected under ERISA's vesting and non-forfeitability provision. In this case, the plan amendment relates to a defined benefit plan and impacts vested benefits in that plan. When an employer is engaged in a fiduciary function, the employer must act solely to benefit the plan, its participants and beneficiaries. *Ladish*, 966 F.2d at 254. A particular activity cannot be both subject to negotiation and a fiduciary function. *NLRB v. Amax Coal Co., Div. of Amax, Inc.*, 453 U.S. 322, 336 (1981), *reh'g denied*, 453 U.S. 950 (1981); *United Independent Flight Officers*, 756 F.2d at 1268. Because the plan amendment permitted by 29 U.S.C. § 1391 impacts vested benefits in a defined benefit pension plan, when considering such an amendment, an employer is engaged in a fiduciary function.[13]

It is important to note that Section 1401(a)(3)(A) provides for a presumption that certain determinations made by the plan sponsor, including those determinations permitted by Section 1391, are correct. If the selection of a method for calculating withdrawal liability was subject to negotiation, there would be no reason to include it within the scope of this presumption. A negotiated selection would never be challenged in arbitration under MPPAA. Moreover, when Congress wanted to provide for employer consent to an amendment, it did so directly. 29 U.S.C. § 1394(a). In addition, Congress provided that the PBGC when it considers whether to approve an amendment

[13] The employers in this case could have avoided the dual loyalty problem if they had granted the Joint Committee the authority to make this decision. In many multi employer plans, the employers have shifted that responsibility to others. In light of the Seventh Circuit's decision in this case, employers will likely want to retain this important responsibility for themselves.

providing for a method unique to a particular plan, it would disapprove the method only if it determined that the amendment created an unreasonable risk to the plan, its participants and beneficiaries or to the PBGC. 29 U.S.C. § 1400(c). Congress was clearly concerned with the welfare of the plan.

Thus, both the general description of fiduciary functions and the provision which allows for selection from among alternative methods for calculating withdrawal liability are consistent with the conclusion that the selection is a fiduciary function. The statute, however, does not clearly resolve the question of whether Congress intended the selection of a method for calculating withdrawal liability to be a fiduciary function. Accordingly, it is appropriate to look to the legislative history to discover Congress' original intent. *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989). If the language of the statutes leaves any doubt as to Congress' intent, the legislative history eliminates that doubt.

The legislative history of MPPAA's withdrawal liability provisions has been extensively quoted, cited and analyzed in numerous cases. *See, eg., Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 212-216 (1986); *Pension Ben. Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 721-725 (1984); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1251-52 (7th Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984). ERISA was Congress' first effort at comprehensive regulation of pension funds. *Peick*, 724 F.2d at 1251. Among the principal purposes of ERISA was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the Plan. *R. A. Gray & Co.*, 467 U.S. at 721. Congress wanted to guarantee that if a worker has been provided a defined pension benefit upon retirement and he has fulfilled the conditions required to obtain a vested benefit, he would actually receive it. *Id.*

With respect to the new employer withdrawal liability provisions, Congress noted that the new provisions would help to insulate a plan from the adverse effects of a sustained decline in the contribution base. H. R. Rep. No. 869, 96th Cong. 2d Sess. 67, *reprinted in* 1980 U. S. Code Cong. & Ad. News at 2935. Significantly, referring to alternative methods for calculating withdrawal liability, the Committee stated: "Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens and protecting the financial soundness of the fund." H. R. Rep. No. 869, 96th Cong. 2d Sess. 67, *reprinted in* 1980 U. S. Code Cong. & Ad. News at 2935. The Committee made it clear that, because of the competing considerations, choosing a method for calculating withdrawal liability which would eliminate or reduce the liability was not a *per se* violation of a fiduciary duty but the fiduciaries' conduct in calculating the withdrawal liability would be measured by whether they acted reasonably and in the interest of the Plan participants and beneficiaries.

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens and protecting the financial soundness of a fund. The Committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not *per se* a violation of a fiduciary standard; the determination must be made as to whether the fiduciary has acted reasonably and in the interests of plan participants and beneficiaries and otherwise in accordance with the fiduciary standard.

Id. This legislative history makes it clear that Congress intended for the selection of a method for calculating withdrawal liability to be a fiduciary function with the sole

focus the best interest of the plan, its participants and beneficiaries.

Various aspects of MPPAA's withdrawal liability provisions have been subject to numerous constitutional challenges. Almost without exception, whenever a court has analyzed or discussed Section 1391 it has noted or simply assumed the obvious, that is, a party or parties with fiduciary obligations to the plan would select the method for calculating withdrawal liability. For example, recently this Court in *Concrete Pipe And Products Of California*, 113 S.Ct at 2276-79, assumed that a party with fiduciary responsibilities to the plan would be making decisions subject to the presumption of correctness contained in 29 U.S.C. § 1401(a)(3)(A). Similarly, in *Peick*, 724 F.2d at 1256, in discussing MPPAA's withdrawal liability provisions, the Seventh Circuit previously noted that **trustees** have substantial discretion in deciding how much to assess any given employer or employers. Referring to Section 1391, the Court continued: "Thus, the statute lists several different methods of allocating a Plan's unfunded vested liability, and it further empowers the **trustee** to seek PBGC approval of a completely different method of their own design," 724 F.2d at 1256 (emphasis added). *See also Robbins v. Pepsi Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 674 (N.D. Ill. 1986), *stay pending appeal denied*, 800 F.2d 641 (7th Cir. 1986).

In *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), the Court held that statutory presumptions of correctness combined with a **trustee's** bias toward maximizing withdrawal liability deprives a withdrawing employer of a right to a fair hearing and is, therefore, an unconstitutional deprivation of due process. In reaching this conclusion, the Court noted that: "While the *trustees* must apply their chosen method uniformly among withdrawn employers, the statute leaves them free to pick among the four suggested methods or to

chose their own." 787 F.2d at 140. This Court affirmed the judgment by an equally divided Court in a *per curiam* order. *Pension Ben. Guaranty Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

In *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1141 (1st Cir. 1985) (*en banc*), the Court also held that because the *trustee's* discretion relating to the calculation of withdrawal liability is limited after the first employer withdraws, the presumption in favor of the correctness of the trustee's withdrawal liability calculations does not violate due process. While reaching different ultimate conclusions on the constitutionality of the presumption afforded to the decision, both the First Circuit and Third Circuit agreed that at least the first time an employer withdraws, MPPAA gives the *trustee* the initial choice for allocating the fund shortfall by selecting one from a number of procedures prescribed by Congress. 762 F.2d at 1141. In similar contexts all the Courts which have considered MPPAA's withdrawal liability provisions, other than in this case, have made similar observations. *See, Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984), *cert. denied sub nom; Sibley, Lindsay & Curr, Co., Div. of Associated Dry Goods Corp. v. Bakery, Confectionery & Tobacco Workers International Union*, 467 U.S. 1259 (1984); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C.C. 1984); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

In the light of the plain language of the statute, the legislative history and the analyses in these cases, it is beyond doubt that Congress intended for the selection of the method for calculating withdrawal liability to be a fiduciary function. As such, any party responsible for making that selection had to act solely in the best interest of the Plan, its participants and beneficiaries. 29 U.S.C.

§ 1104. The Seventh Circuit ignored all traditional indications of legislative intent in order to be able to substitute its view for the intent of Congress.

Apparently in an effort to discourage further consideration of the important legal issue, the Seventh Circuit went on to make a finding of fact. The Court found that the Record did not contain sufficient evidence to establish that the direct attribution method was better for the Plan than the presumptive method. Slip op. at 14. In making the finding of fact, the Seventh Circuit disregarded the presumption of correctness built into MPPAA in 29 U.S.C. § 1401(a)(3)(A), which this Court recently examined and found constitutional in *Concrete Pipe*, 113 S.Ct. at 2283. This Court held that Congress clearly intended to shift the burden of persuasion to the employer in a factual dispute. 113 S.Ct. at 2283. In this case, the Plan made a factual determination that the direct attribution method was in its best interest in 1981. Schlitz, therefore had the burden in the first instance to present contrary evidence. The record is clear that Schlitz has not met that burden. Therefore, the Seventh Circuit's fact finding erroneously fails to consider the appropriate burden of proof under MPPAA and it should be disregarded.[14]

CONCLUSION

This case presents the Court with the opportunity to resolve an intolerable conflict among the Circuits on the interpretation of a provision of MPPAA which is utilized every time an employer withdraws from a multiemployer plan. It also provides this Court with the opportunity to consider the decision of the Seventh Circuit that Congress did not intend the selection of the method for calculating

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[14] Neither the arbitrator nor the District Court made a finding of fact on this issue.

withdrawal liability to be a fiduciary function. This decision is on a significant question of federal law which has wide-ranging ramifications. It is also inconsistent with the language and structure of MPPAA, the legislative history of the Act and the cases which have considered the withdrawal liability provisions. Accordingly, the Milwaukee Brewery Workers' Pension Plan respectfully requests that this Court allow the Petition for *Certiorari* to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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